

92-602

No.

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1992

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ST. MARY'S HONOR CENTER and STEVEN LONG,  
*Petitioners,*

vs.

MELVIN HICKS,  
*Respondent.*

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Petition for Writ of Certiorari to the  
United States Court of Appeals for the Eighth Circuit

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**PETITION FOR WRIT OF CERTIORARI**

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### **QUESTION PRESENTED**

In a Title VII and 42 U.S.C. § 1983 action alleging unlawful discrimination, whether a judgment for the employee is compelled, as a matter of law, by a finding that the employer's legitimate, non-discriminatory reasons for adverse employment action are pretextual.

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The petitioners, St. Mary's Honor Center and Steven Long, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on July 23, 1992.

**OPINIONS BELOW**

The Opinion of the Court of Appeals for the Eighth Circuit is reported at *Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (8th Cir. 1992), and is reprinted in the appendix hereto at page A-1. The Order of the District Court and the Memorandum of the District Court is reported at *Hicks v. St. Mary's Honor Center*,

756 F. Supp. 1244 (E.D. Mo. 1991); the Order is reprinted in the appendix hereto at page A-13, and the Memorandum is reprinted in the appendix hereto at page A-14.

### JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 2000e *et seq.* and 28 U.S.C. § 1343, the respondent brought this suit in the United States District Court for the Eastern District of Missouri. After trial to the court, the District Court entered judgments in favor of petitioners. See page A-13 herein.

On respondents' appeal, the Court of Appeals for the Eighth Circuit, on July 23, 1992, entered a judgment and opinion reversing the judgment of the District Court, directing the District Court to enter judgment in favor of respondent, and remanding the case for further findings on the remaining issues, including damages. See page A-12 herein. A timely petition for rehearing or rehearing *en banc* was filed on August 5, 1992, and was denied on September 3, 1992. See page A-31 herein.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

### STATEMENT OF THE CASE

Respondent Melvin Hicks, a supervisory employee at St. Mary's Honor Center, an adult correctional institution of the Missouri Department of Corrections, brought a Title VII action against the Honor Center and a 42 U.S.C. § 1983 action against Steven Long, the Honor Center's Superintendent. Hicks alleged that his demotion and discharge were motivated by racial discrimination.

After a trial on the merits to the court, the District Court found that Hicks proved a *prima facie* case of racial discrimination by being a black man and a member of a protected class, meeting the

applicable job qualifications of a shift commander, being demoted and discharged, and his shift commander's position being filled by a white male. The District Court further found that the Honor Center and Long proved two legitimate, non-discriminatory reasons for Hicks' demotion and discharge, which were the severity and accumulation of violations of institutional rules over a short period of time. The District Court finally found that Hicks proved that the reasons adduced by the Honor Center and Long for Hicks' demotion and discharge were pretextual. First, Hicks was the only person disciplined for institutional rule violations actually committed by his subordinates. Second, though the chief of custody claimed that it was his policy to discipline the shift commander for his subordinates' rule violations, a white shift commander was not so disciplined. Third, white employees were not disciplined for committing more serious rule violations than Hicks committed. Fourth, the chief of custody "manufactured" the confrontation between himself and Hicks that led to Hicks' discharge. See pages A-22 through A-26 herein.

The District Court concluded that Hicks failed to prove his "ultimate burden," that his demotion and discharge were racially motivated. Hicks "need not prove racial motivation by direct evidence; instead, plaintiff may offer circumstantial evidence sufficient to create an inference of racial motivation." See page A-26 herein. While it was clear that Hicks was on "the express track to termination" and had proven "the existence of a crusade to terminate him," he had not proven that "the crusade was racially rather than personally motivated." See pages A-26, 27 herein. Hicks had not proven "by direct evidence or inference that his unfair treatment was motivated by his race." See page A-29 herein.

The District Court relied on the following evidence when it concluded that Hicks had not proven that his demotion and discharge were racially motivated. First, though Hicks proved

that he was disciplined more harshly than his co-employees, his black subordinates, who actually committed the institutional rule violations for which Hicks was disciplined, were not disciplined at all. Second, between January and December of 1984, though approximately twelve black persons and one white person were discharged from the Honor Center, Superintendent Long hired thirteen black persons; thirty black persons were employed at the Honor Center in January of 1984 and twenty-nine in December of that year. Third, the full-scale removal of employees from supervisory positions is often required when an institution is as poorly run as the Honor Center was. Before January of 1984, black persons held five of the six supervisory positions at the Honor Center. After January of 1984, two black persons and four white persons held supervisory positions, and if the black male to whom the chief of custody position initially had been offered had accepted the position, three white persons and three black persons would have held supervisory positions. Fourth, the disciplinary review board that reviewed Hicks' violation which led to his demotion was composed of two black and two white persons and recommended demotion. Fifth, Long was never aware of a study which warned that black persons possessed too much power at the Honor Center. See pages A-27 through A-28 herein.

The Court of Appeals concluded, however, that once the District Court found that Hicks had proven pretext, "[t]he record of the district court thus contain[ed] the necessary findings to compel a conclusion that plaintiff is entitled to judgment as a matter of law." See page A-12 herein.

## REASON FOR GRANTING THE WRIT

**THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT'S DECISION THAT PROOF OF A *PRIMA FACIE* CASE AND PRETEXT COMPELS, AS A MATTER OF LAW, JUDGMENT FOR THE EMPLOYEE IS IN CONFLICT WITH THE FIRST AND SEVENTH CIRCUITS' DECISIONS ON THE SAME MATTER AND WITH APPLICABLE DECISIONS OF THIS COURT.**

In the United States Court of Appeals for the Seventh Circuit, proof of a *prima facie* case and pretext does not compel judgment for the employee, but only supports such a judgment if one is returned by the trier of fact.

If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn. This is the common sense behind the rule of *McDonnell Douglas [Corp. v. Green]*, 411 U.S. 792 (1973)]. It is important to understand, however, that the inference is not compelled. The trier of fact must decide after a trial whether to draw the inference. The lie may be concealing a reason that is shameful or stupid but not proscribed, in which event there is no liability.

*Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990). See also *Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557, 559 (7th Cir.), cert. denied, 484 U.S. 977 (1987). A trier of fact may infer a forbidden motivation for an adverse employment action from only the *prima facie* case and pretext.

This is not a case where the plaintiff's only evidence of age discrimination is that he was replaced by a younger worker and that the stated grounds for firing him is spurious. That would be the kind of case that just barely survives the employer's motion for summary judgment: a case where

the evidence of discrimination is entirely circumstantial, indirect.

*Shager, supra*, 913 F.2d at 402. See also *Pollard, supra*, 824 F.2d at 559.

Also in the United States Court of Appeals for the First Circuit, proof of a *prima facie* case and pretext does not compel judgment for the employee, but only supports such a judgment if one is returned by the trier of fact.

Even assuming the original *prima facie* case plus the evidence of pretext suffices to raise a reasonable inference of discrimination, this does not automatically entitle plaintiff to judgment. Provided a contrary inference (of nondiscrimination) might also be reasonably be drawn from the evidence, such showing only creates an issue of material fact for trial and, if discrimination is subsequently found, will support that finding.

*Samuels v. Raytheon Corp.*, 934 F.2d 388, 392 (1st Cir. 1991). See also *Villanueva v. Wellesley College*, 930 F.2d 124, 128 (1st Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 181, \_\_\_ L.Ed.2d \_\_\_ (1991).<sup>1</sup>

In this case there was evidence to support the inference that the employee's demotion and discharge were "personally motivated." The District Court concluded:

The violation for which plaintiff was terminated involved plaintiff's making threats to Powell [the chief of custody]. Although the court does not condone the threatening of one's supervisor, the evidence suggests that Powell

<sup>1</sup> The First Circuit's recent opinion in *Fields v. Clark University*, 966 F.2d 49, 51-52 (1st Cir. 1992), does not compel judgment for the employee upon proof of a *prima facie* case and pretext. The opinion merely states that where the employee fails to prove pretext, he or she may still prove intentional discrimination by the *prima facie* case.

manufactured the confrontation between plaintiff and himself in order to terminate plaintiff. After plaintiff was informed of his demotion, he was distressed and requested the day off. Steve Long granted the request. As plaintiff attempted to leave, Powell followed him and provoked him into behaving irrationally.

See page A-26 herein, footnote omitted. The District Court concluded that Hicks had not proven that "the crusade [to discharge him] was racially rather than personally motivated." See page A-27 herein.

The reason an inference of unlawful discrimination is not compelled by proof of a *prima facie* case and pretext is that a discredited legitimate, non-discriminatory reason for adverse employment action is not necessarily proof of intentional discrimination, but rather may be proof of some other motivation.

Although the *prima facie* cases raise an inference of discrimination, the fact finder is not compelled to award victory to the plaintiff simply because the employer has not been candid about the real reason for the firing. . . . Even if the employer lies about the real reasons for the firing, other reasons, not impermissible under federal law, might be suggested by the evidence.

*Veatch v. Northwestern Memorial Hospital*, 730 F. Supp. 809, 819 (N.D. Ill. 1990). Possible reasons are a violation of a civil service system or collective bargaining agreement, personal or political favoritism, a grudge, random conduct, or error in the administrative of neutral rules. *Pollard, supra*, 824 F.2d at 559; *Benzies v. Illinois Department of Mental Health and Developmental Disabilities*, 810 F.2d 146, 148 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987). Another possible reason is, as the evidence suggested in this case, personal animosity.

The Court of Appeals for the Eighth Circuit's reasoning for its conclusion that judgment for the employee is compelled follows:

Once plaintiff proved all of the defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law. Because all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race.

See page A-10 herein.<sup>2</sup>

This reasoning is merely the application of the legally rebuttable mandatory inference arising from the employee's *prima facie* case to the employee's ultimate burden of intentional discrimination. The fallacy in this reasoning is that once the employer introduces evidence of a legitimate, non-discriminatory reason, even if it is untrue, the mandatory inference raised by the *prima facie* case is rebutted and "drops from the case." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254-256, 255 n. 10 (1981). The Eighth Circuit's decision, then, is in conflict with this Court's decision in *Burdine*. The Eighth Circuit's approach has been specifically rejected by the First Circuit.

It was suggested at oral argument in this case that a mechanical application of the *McDonnell Douglas* framework was the correct one. Under that analysis, once a

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<sup>2</sup>The Court of Appeals' characterization of the District Court's Memorandum as requiring the employee to "additionally prove by direct evidence or inference that the treatment was motivated by race..." (see page A-11 herein) is not supported by the District Court's Memorandum. The District Court did not adopt the "pretext-plus" approach to proof of racial motivation in discriminatory treatment cases. See generally *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 728 (8th Cir. 1992).

plaintiff has produced evidence of pretext, the employer's justification vanishes and the original *McDonnell Douglas* inference of discrimination rises again. . . . We reject that formalistic approach as not in keeping with either Supreme Court doctrine or common sense.

*Villanueva, supra*, 930 F.2d at 128.

"The *prima facie* case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized or ritualistic. Rather it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.' " *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983), quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). The sensitive and difficult question facing triers of fact in discrimination cases is best resolved by focusing on the ultimate question of discrimination *vel non*, rather than the individual segments of the *McDonnell Douglas* allocation of burdens of proof. *Aikens, supra*, 460 U.S. at 714-716. The Eighth Circuit's decision, then, is in conflict with this Court's decision in *Aikens*.

Rejecting a formalistic application of the *McDonnell Douglas* allocation of burdens of proof, and believing that the evidence supported a motivation for Hicks' demotion and discharge more credible than those offered by either Hicks or the Honor Center and Long, the District Court properly concluded that Hicks had not proven intentional discrimination.

## CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

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## **APPENDIX**

APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

No. 91-1571

Melvin Hicks,  
Appellant,

v.

St. Mary's Honor Center,  
Division of Adult Institutions of the  
Department of Corrections and Human Resources  
of the State of Missouri; Steve Long,  
Appellees.

Appeal from the United States District Court  
for the Eastern District of Missouri

Submitted: November 13, 1991

Filed: July 23, 1992

Before THEODORE McMILLIAN and JOHN R. GIBSON,  
Circuit Judges, and ELMO B. HUNTER,\* Senior District  
Judge.

McMILLIAN, Circuit Judge.

Melvin Hicks ("plaintiff") appeals from a final judgment entered in the United States District Court for the Eastern District of Missouri, after a bench trial, in favor of St. Mary's Honor Center ("St. Mary's") and Steve Long (together "defendants") on the merits of his racial discrimination claim against St. Mary's under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. 2000e *et seq.*, and his equal protection claim against Long

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\*The Honorable Elmo B. Hunter, Senior United States District Judge for the Western District of Missouri, sitting by designation.

under 42 U.S.C. § 1983.<sup>1</sup> *Hicks v. St. Mary's Honor Center*, No. 88-109C(5) (E.D. Mo. Jan. 31, 1991). On plaintiff's behalf, the Equal Employment Opportunity Commission ("EEOC") has appeared in this appeal as an amicus curiae. For reversal, plaintiff and the EEOC argue that the district court erred in holding that plaintiff failed to meet his burden of proving racial discrimination even though he had established a prima facie case of discrimination and had proven by a preponderance of the evidence that defendants' proffered nondiscriminatory reasons for demoting and terminating him were pretextual. For the reasons stated below, we reverse the judgment of the district court and remand the case with directions.

### Facts

The following summarizes the facts as found by the district court. St. Mary's is a minimum security correctional facility operated by the Missouri Department of Corrections and Human Resources ("MDCHR"). Plaintiff, an African-American, was hired as a correctional officer at St. Mary's in August 1978. He was promoted to shift commander, a supervisory position, in February 1980.

Starting in 1983, MDCHR began investigating the administration of St. Mary's in response to complaints about poor maintenance, inadequate security, and other concerns at the facility. As a result, several persons at the upper levels of St. Mary's administration were demoted or terminated, and new people were hired. Among the changes that were made, defendant Long became the superintendent of St. Mary's. John Powell became the chief of custody and plaintiff's immediate supervisor. Long and Powell are both white.

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<sup>1</sup> A third claim brought by plaintiff against both St. Mary's and Long under 42 U.S.C. § 1981 was dismissed on the merits after the district court granted partial summary judgment in defendants' favor on December 7, 1989. The dismissal of that claim is not part of this appeal.

Prior to 1984, plaintiff had a satisfactory employment record. Plaintiff's supervisors had consistently rated his performance as competent. He had not been suspended, written up, or otherwise disciplined.<sup>2</sup> In early 1984, however, plaintiff became the subject of a series of disciplinary actions, based upon three separate incidents occurring in March of that year. The disciplinary actions led to his termination on June 7, 1984.

On March 3, 1984, while plaintiff was on duty as shift commander, two transportation officers observed a number of violations of institutional rules. One of the two transportation officers, Edward Ratliff, submitted a written report about these violations to Powell. A disciplinary review board met and recommended that plaintiff be suspended for five days. Plaintiff was given the five-day suspension. Other officers who were also responsible for the violations were not disciplined. Powell testified that it was his policy to discipline only the shift commander for violations which occur during a shift. Slip op. at 4.

On March 19, 1984, plaintiff gave two correctional officers permission to use a St. Mary's vehicle. Neither the correctional officers nor the control center officer on duty at the time logged the use of the car, despite an institutional rule requiring such logging. Powell sought disciplinary action against plaintiff. A disciplinary review board met on April 6, 1984, and voted to recommend that plaintiff be demoted for failing to insure that the use of the car was logged. Powell, who was on the disciplinary board, voted to terminate plaintiff. Plaintiff was demoted to correctional officer I. Neither the control officers who borrowed the car, nor the control officer on duty, was disciplined. *Id.* at 4-5.

On March 21, 1984, while plaintiff was still a shift commander, two inmates were involved in a brawl. One of the two

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<sup>2</sup> Once, in 1980, plaintiff was mistakenly written up as absent without notice. He was on vacation at the time. Slip op. at 3 n.4.

inmates was injured and required emergency medical treatment. After learning that the inmate had been injured in a fight, plaintiff drafted a memorandum to Powell notifying him of the fight and the inmate's injury. Plaintiff ordered the correctional officer who had escorted the injured inmate to the hospital to write a report on the incident. On March 24, 1984, Powell submitted a report to Long charging plaintiff with failure to investigate the assault. On March 29, 1984, Powell gave plaintiff a letter of reprimand, citing failure to investigate the assault as the violation. *Id.* at 5-6.

On April 19, 1984, plaintiff was notified of his demotion during a meeting with Long, Powell, and Vincent Banks, the assistant superintendent. After hearing the news, plaintiff requested and was granted the day off. As plaintiff was leaving, Powell followed him and ordered him to open his locker so Powell could take plaintiff's shift commander manual. Plaintiff refused and the two men exchanged heated words. Plaintiff then indicated that he would "step outside" with Powell.<sup>3</sup> Powell warned him that his words could be perceived as a threat. Plaintiff then left. Powell sought disciplinary action on grounds that plaintiff had threatened him. A disciplinary board was convened and recommended a three-day suspension. Long disregarded their vote and instead recommended termination; he testified that this recommendation was based upon the accumulation and severity of plaintiff's violations. On June 7, 1984, plaintiff was terminated. *Id.* at 6-7.

By contrast, when plaintiff filed a report in April 1984 recommending that correctional officer Arthur Turney be disciplined for insubordination to a supervisor, after Turney cursed plaintiff with highly profane language because of a poor service rating, no disciplinary action was taken against Turney. Powell

<sup>3</sup> The district court concluded that "Powell followed [plaintiff] and provoked him into behaving irrationally." Slip Op. at 16.

concluded that Turney was "merely venting justifiable frustration." *Id.* at 9, 16 n.17.<sup>4</sup>

During this same period from January through June 1984, plaintiff reported violations of institutional rules on numerous occasions but his reports were generally ignored. For example, plaintiff reported to Powell an incident in which transportation officer Ratliff allowed his brother to bring a gun into the correctional facility without checking it at the front desk, despite specific instructions from plaintiff that the gun should be checked. Powell took no disciplinary action. Plaintiff later notified Powell of an incident in which Ratliff instructed an inmate to climb over a wall into Steve Long's locked office so Ratliff could obtain some inmate work passes that were inside. Despite the security breach, Powell did not seek discipline of Ratliff.<sup>5</sup> On two occasions in March, plaintiff arrived at work to find the front desk unattended. Apparently both times the shift commander on duty was aware of the front desk officer's absence and had ordered the control center officer to open and close the front door. Plaintiff reported these violations but nobody — including the shift commander, Sharon Hefelee — was disciplined. Nor was Hefelee disciplined when, on another occasion, plaintiff reported that he found two doors that were supposed to be locked at all times left open under her command. Plaintiff also reported an incident in April 1984 in which a correctional officer, John Newland, took a set of St. Mary's keys home with him; no discipline followed. Another incident occurred in April 1984 in which an inmate escaped due to a correctional officer's admitted negligence. The officer, Michael Doss, received only a letter of reprimand. *Id.* at 7-9.

<sup>4</sup> The district court observed "Powell, however, was considerably more sensitive as the victim of insubordination." Slip op. at 16 n.17.

<sup>5</sup> According to the district court, Powell actually praised Ratliff for his quick thinking in "diffusing a volatile situation." Slip op. at 8 n.10.

Turney, Ratliff, Hefe, Newland, and Doss are all white. *Id.* at 3 n.3, 7 n.8, 8 n.12, 9 nn.13 & 14.

During the period from December 1983 to December 1984, approximately twelve blacks and one white were fired at St. Mary's. During this period, the number of blacks hired at St. Mary's was approximately the same as the number of blacks fired. Slip op. at 9.<sup>6</sup>

### Discussion

Plaintiff's Title VII claim against St. Mary's and his § 1983 claim against Long were jointly tried by the district court after plaintiff waived his right to a jury trial on the § 1983 claim. In its memorandum opinion, the district court addressed the Title VII claim first and then disposed of the § 1983 claim under the same analysis, reasoning that "the elements of the cause of action are the same under both [Title VII and § 1983]." Slip op. at 21. We agree with the district court that the elements of plaintiff's discrimination claim against Long are the same as those which he must prove against St. Mary's under Title VII. *See Richmond v. Board of Regents*, 957 F.2d 595, 598 (8th Cir. 1992) (burden of showing prima facie case of discrimination is the same under

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<sup>6</sup> The district court's findings do not, however, specify the levels of position at which these black individuals were hired and fired. Nor did the district court make relative comparisons of the treatment of blacks versus whites at specific positions. According to plaintiff, of the ten white employees who were on the custody roster at St. Mary's as of April 1984, five were promoted. Plaintiff additionally contends that the breakdown of blacks hired and fired demonstrates discrimination against blacks in *supervisory* positions. Plaintiff also introduced evidence at trial of a study performed in 1980 and 1981 of two honor centers in St. Louis and Kansas City. According to the district court's findings, this study concluded that "too many blacks were in positions of power at St. Mary's, and that the potential for subversion of the superintendent's power, if the staff became racially polarized, was very real." However, none of the witnesses for the defense admitted to being aware of the study at the time of the 1984 personnel changes at St. Mary's. Slip op. at 10.

Title VII, § 1981, § 1983, or the Age Discrimination in Employment Act (ADEA)); *Briggs v. Anderson*, 796 F.2d 1009, 1021 (8th Cir. 1986) (*Briggs*) (inquiry into intentional discrimination for individual actions brought under §§ 1981 and 1983 is essentially the same as inquiry under Title VII); *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 468 n.5 (8th Cir. 1984) (*Craik*) (issue of discriminatory intent is common to analyses under Fourteenth Amendment, § 1983, and Title VII).

It is undisputed that Long was personally involved in demoting and terminating plaintiff and that his acts were causally connected to plaintiff's demotion and termination. Slip op. at 20 ("Steve Long recommended the demotion and termination of plaintiff in his capacity as superintendent of a state correctional facility.") Moreover, St. Mary's and Long were jointly represented at trial, and they relied on the same evidence in defending the discrimination claims against them. Thus, under the circumstances of this case, to the extent plaintiff prevails on his Title VII claim against St. Mary's, he is equally entitled to relief against Long under § 1983. *See Irby v. Sullivan*, 737 F.2d 1418, 1425 (5th Cir. 1984) (individual may be held personally liable under § 1983 if he or she was personally involved in the unconstitutional conduct or there was a causal connection between the individual's acts and the constitutional violation). Accordingly, we confine our discussion to the common issue of whether plaintiff proved a Title VII violation on grounds that defendants intentionally discriminated against him on the basis of race. *See Briggs*, 796 F.2d at 1021 (confining discussion of Title VII and § 1983 claims to Title VII analysis because issue of discriminatory intent is common to both); *Craik*, 731 F.2d at 468 n.5 (same).

Because plaintiff's Title VII claim was based upon a disparate treatment theory, the district court analyzed this claim under the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (*McDonnell Douglas*), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (*Burdine*).

The *McDonnell Douglas-Burdine* disparate treatment analysis proceeds in three stages. First, the plaintiff has the initial burden of establishing a prima facie case of disparate treatment, thus creating an inference of discrimination. *Burdine*, 450 U.S. at 253-54 & n.6. In the present case, the district court found that “[p]laintiff proved a prima facie case of race discrimination.” Slip op. at 12.<sup>7</sup>

Next, the defendant may rebut the presumption by articulating a legitimate, nondiscriminatory reason or reasons for the adverse employment action. “It is sufficient if the defendant’s evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.” *Burdine*, 450 U.S. at 254-55. The district court found that defendants had “set forth essentially two reasons for the adverse employment actions: the severity and the accumulation of violations committed by plaintiff.” Slip op. at 12.<sup>8</sup>

At the final stage, the plaintiff is given the opportunity to prove that the defendant’s stated reasons were not the true reasons — and therefore are a mere pretext — for the adverse employment action.

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision.

This burden now merges with the ultimate burden of

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<sup>7</sup> Plaintiff’s prima facie case was based upon the facts that plaintiff was black and therefore a member of a protected class; he was qualified for the position of shift commander; he was demoted from shift commander to correctional officer, and then was terminated; and his position remained open and was presently filled by a white male. Slip op. at 12. See also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (setting forth elements of a typical prima facie case).

<sup>8</sup> Long testified that his recommendation to terminate plaintiff was based upon the severity and accumulation of plaintiff’s violations. Slip op. at 7.

persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.

*Burdine*, 450 U.S. at 256. At this stage of the analysis in the present case, the district court held “[p]laintiff has proven that the reasons proffered by defendant are pretextual.” Slip op. at 13. Indeed, the district court outlined the evidence for some three pages before again stating that “[p]laintiff has carried his burden in proving that the reasons given for his demotion and termination were pretextual.” *Id.* at 16. The district court considered the facts that plaintiff was “mysteriously” the only one disciplined for violations actually committed by his subordinates; that the alleged policy of disciplining only the shift commander for violations occurring during a shift was only applied to plaintiff’s shifts; and that, on numerous occasions, plaintiff was singled out for unusually harsh disciplinary treatment while others who committed more serious violations either were not disciplined or were treated more leniently. *Id.* at 13-16. Yet a third time, the district court summed up and made clear that plaintiff had succeeded in proving the violations were pretextual reasons for his demotion and discharge. *Id.* at 19.

The district court, however, went on to state:

[A]lthough plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated. . . . [P]laintiff has succeeded in proving that the violations for which he was disciplined were pretextual reasons for his demotion and discharge. Plaintiff has not, however, proven by direct evidence or inference that his unfair treatment was motivated by his race.

*Id.* at 17, 19. We hold that, by reaching this ultimate conclusion, the district court erred in its analysis.

First, it was improper for the district court to assume — without evidence to support the assumption — that defendants' actions were somehow "personally motivated." As the district court noted, defendants articulated only two legitimate, nondiscriminatory reasons for their actions (the severity and the accumulation of violations), and both were discredited by plaintiff as pretextual. While we question whether such a hypothetical reason based upon *personal* motivation even could be stated and still be "legitimate" and "nondiscriminatory," we need not address that question because defendants simply never stated that personal motivation was a reason for their actions or offered evidence to substantiate such a claim. In order to satisfy its burden at the second stage of the *McDonnell Douglas-Burdine* analysis, "the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Burdine*, 450 U.S. at 255.

Once plaintiff proved all of defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law. Because all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race.

A *prima facie* case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. . . . And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any under-

lying reasons, especially in a business setting. Thus, when all legitimate reasons for [the adverse employment action] have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based [its] decision on an impermissible consideration such as race.

*Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (citation omitted); see *Burdine*, 450 U.S. at 256.

In this circuit, if the plaintiff has met his or her burden of proof at the pretext stage — that is, if the plaintiff has proven by a preponderance of the evidence that all of the defendant's proffered nondiscriminatory reasons are not true reasons for the adverse employment action — then the plaintiff has satisfied his or her ultimate burden of persuasion. No additional proof of discrimination is required. See *Williams v. Valentec Kisco, Inc.*, No. 90-2909 at 7-8 (8th Cir. Apr. 29, 1992) (rejecting the so-called "pretext-plus" approach); *Adams v. Nolan*, No. 91-1489 at 89 & n.7 (8th Cir. Apr. 23, 1992) (same); *Brooks v. Monroe Systems for Business Inc.*, 873 F.2d 202, 204 (8th Cir.) (under ADEA, submission of discredited reason for adverse employment action is itself evidence of discriminatory motive), *cert. denied*, 493 U.S. 853 (1989); *MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1059 (8th Cir. 1988) (under ADEA, rejecting the argument that "even if [the defendant's] proffered reasons for firing [the plaintiff] were not its true reasons, [the plaintiff] must still prove intentional discrimination, instead of merely discrediting [the defendant's] defense").

In the present case, the district court made an unequivocal factual finding that plaintiff had satisfied his burden of proving that the reasons articulated by defendants for his demotion and discharge were pretextual. The only reason given by the district court for failing to enter judgment based on this finding of pretext was the requirement that plaintiff additionally prove by direct evidence or inference that the treatment was motivated by race,

which we have found contrary to the law. The record of the district court thus contains the necessary findings to compel a conclusion that plaintiff is entitled to judgment as a matter of law. The numerous cases of the Supreme Court, including *McDonnell Douglas*, *Burdine*, and *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983), as well as our decisions which have followed them, make clear that plaintiff may succeed by proving pretext. The district court found that he had done so. Plaintiff is therefore entitled to recover.

Accordingly, we reverse the judgment of the district court on the merits of plaintiff's Title VII claim against St. Mary's and his § 1983 claim against Long.<sup>9</sup> The district court shall enter judgment for plaintiff accordingly. We remand the case to the district court for further findings on the remaining issues, including damages.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,  
EIGHTH CIRCUIT.

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<sup>9</sup> Having reversed the district court on the basis of plaintiff's disparate treatment theory, we need not reach the question of whether the district court erred in failing to address plaintiff's alternative theory of retaliatory discharge as a separate basis for Title VII liability.

**APPENDIX B**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

No. 88-109 C (5)

MELVIN HICKS,  
Plaintiff,

vs.

ST. MARY'S HONOR CENTER, and STEVE LONG,  
Defendants.

**ORDER**

[Filed: January 31, 1991]

In accordance with the memorandum filed herein this day,

IT IS HEREBY ORDERED that judgment is entered in favor of defendant St. Mary's Correctional Center and against plaintiff on the merits of Count I of plaintiff's complaint.

IT IS FURTHER ORDERED that judgment is entered in favor of defendant Steve Long and against plaintiff on the merits of Count III of plaintiff's complaint.

Dated this 31st day of January, 1991.

/s/ Stephen Limbaugh  
UNITED STATES  
DISTRICT JUDGE

## APPENDIX C

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

No. 88-109 C (5)

MELVIN HICKS,  
Plaintiff,

vs.

ST. MARY'S HONOR CENTER, et al.,  
Defendants.

## MEMORANDUM

Plaintiff filed a three-count complaint against defendant St. Mary's Honor Center ("St. Mary's") and defendant Steve Long. Defendant St. Mary's is a minimum security correctional facility operated by the Missouri Department of Corrections and Human Resources ("MDCHR"). Defendant Steve Long was the superintendent of St. Mary's from January 7, 1984 to May 16, 1985. In Count I plaintiff alleges that St. Mary's violated Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* by demoting and then terminating plaintiff because of his race. In Count II plaintiff alleges that St. Mary's and Steve Long violated 42 U.S.C. § 1981. On December 7, 1989 the Court entered summary judgment in favor of defendants and against plaintiff on the merits of Count II. In Count III plaintiff alleges that Steve Long violated 42 U.S.C. § 1983 by demoting and then terminating plaintiff because of his race.

The case was tried before the court on June 5, June 6, and June 14, 1990. The Court, having considered the pleadings, the testimony of the witnesses, and the documents in evidence, hereby makes the following findings of fact and conclusions of law as required by Fed.R.Civ.P. 52.

## A. Findings of Fact

Plaintiff began working at St. Mary's in August, 1978 as a correctional officer I. Plaintiff was promoted to shift commander in February, 1980. In late 1983 Arthur Schulte was superintendent at St. Mary's, and Vincent Banks was assistant superintendent. Gilbert Greenlee was chief of custody. Plaintiff and Carl MacAvoy were shift commanders; Charles Woodard served as an acting shift commander.<sup>1</sup>

In 1983, George Lombardi, the assistant director of the Division of Adult Institutions of MDCHR, received numerous complaints from inmates, former inmates, staff, legislators and other citizens concerning conditions at St. Mary's. Lombardi placed an undercover investigator at St. Mary's to observe how the institution was being run. Lombardi also made a series of unannounced visits and found a poorly maintained institution with substandard upkeep, inadequate security measures, and no effective rules or regulations. Lombardi instructed Schulte to improve conditions, but Schulte failed. In January, 1984 Lombardi demoted and transferred Schulte to another correctional institution. Schulte was replaced by Steve Long. Other personnel changes at St. Mary's were also made. Gilbert Greenlee was demoted and transferred. Carl MacAvoy and Charles Woodard were terminated. John Powell, replaced Greenlee as chief of custody.<sup>2</sup> Sharon Hefelee replaced Charles Woodard as a shift commander; J.R. Wilson replaced Carl MacAvoy as a shift commander.<sup>3</sup> After the personnel changes, Lombardi found remarkable improvements in the manner that St. Mary's was run.

<sup>1</sup> Arthur Schulte is white. Plaintiff, Vincent Banks, Gilbert Greenlee, Carl MacAvoy and Charles Woodard are black.

<sup>2</sup> The position of chief of custody was initially offered to a black male who refused the position.

<sup>3</sup> John Powell, Sharon Hefelee, and J.R. Wilson are white.

Prior to January, 1984 plaintiff had a satisfactory employment record. Plaintiff's supervisors consistently rated plaintiff's performance as competent, and plaintiff was not suspended, written up, or otherwise disciplined.<sup>4</sup> Plaintiff, however, became subject to frequent discipline after he was placed under the supervision of John Powell.

On March 3, 1984 plaintiff was the shift commander on the first shift. Plaintiff's hours on duty were 11:30 p.m. to 7:30 a.m. During plaintiff's shift Edward Ratliff and Frank Slinkard, transportation officers at St. Mary's, arrived to pick up inmates who were scheduled to work that day at jobs outside St. Mary's. When Ratliff and Slinkard attempted to enter St. Mary's, they found that there was no officer present at the front door.<sup>5</sup> Elvis Thomas, the control center officer, momentarily left his assigned post to open the front door. After Ratliff and Slinkard entered St. Mary's, they noticed that the first floor lights were off. Plaintiff, who was performing a perimeter check of the premises, and correctional officer Charles Kennedy were not present when Ratliff and Slinkard entered St. Mary's.

Ratliff wrote an incident report to John Powell concerning the violations of institutional rules he observed during his March 3, 1984 visit to St. Mary's. The violations brought to Powell's attention included (1) the front door officer being away from his position, (2) the control center officer leaving his post to open the front door, (3) the absence of Charles Kennedy, and (4) the lights being off on the first floor. A four-person disciplinary review board, composed of two whites and two blacks, met and recom-

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<sup>4</sup>In 1980 plaintiff was written up for being absent without notice. Plaintiff, however, was on vacation at the time.

<sup>5</sup>Ratliff and Slinkard later found Don Treglown, the front door officer, balancing his checkbook in the break room.

mended that plaintiff be given a five-day suspension.<sup>6</sup> In accordance with the disciplinary review board's recommendation, plaintiff was suspended for five days. Treglown was not disciplined for being away from his post. Thomas was not disciplined for leaving his post. Kennedy was not disciplined for being absent for a substantial period of time. Powell testified that it is his policy to discipline only the shift commander for violations which occur during his shift.

On March 19, 1984 Don Moore, a correctional officer, was ordered during his first shift to work a double shift. Moore had driven a borrowed automobile to work that day, and had to return it to a friend at the end of his first shift. Moore asked plaintiff if another correctional officer could follow Moore to his friend's house in a St. Mary's vehicle, and then drive Moore back to St. Mary's. Plaintiff ordered correctional officer Jimmie Davis to follow Moore in a St. Mary's vehicle. Institutional rules require that each use of a St. Mary's vehicle be entered into a log. Neither Don Moore, Jimmie Davis, nor the control center officer entered into the log book the use of the St. Mary's vehicle.

Powell recommended that plaintiff be disciplined for failing to log the use of the St. Mary's vehicle. On April 6, 1984 a four-person disciplinary review board, composed of two blacks and two whites, convened and voted to recommend the demotion of plaintiff.<sup>7</sup> In accordance with the disciplinary review board's recommendation, plaintiff was demoted from shift commander to correctional officer I. Plaintiff was not disciplined for authorizing the use of the vehicle, but instead for failing to insure it was

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<sup>6</sup>The disciplinary review board makes a recommendation to the superintendent. The superintendent, in turn, makes a recommendation to the Director of MDCHR. The Director of MDCHR makes the ultimate decision concerning discipline.

<sup>7</sup>John Powell, a member of the disciplinary board, voted to terminate plaintiff for the infraction.

logged. Neither Moore, Davis, nor the control center officer were disciplined for failing to log the use of the vehicle.

On March 21, 1984 two inmates were involved in a brawl in which one, Mark Valenti, was injured and received emergency medical treatment. After the brawl Valenti told plaintiff that he injured himself lifting weights. On the way to the hospital Valenti admitted to correctional officer William Garrett that he was punched in the chest by inmate Allen Johnson. On March 21, 1984 plaintiff drafted a memorandum to John Powell informing him that there was a fight between Valenti and Johnson and Valenti was injured. Plaintiff ordered Garrett to submit a report.

On March 24, 1984 Powell submitted a report to Steve Long in which he charged plaintiff with a failure to investigate the assault. Powell stated: "Although the medical out count was logged, and a memorandum was submitted on this matter, NO ACION [sic] was taken by the Shift Commander in investigating the seriousness of the assault or the after effects on the residents involved." On March 29, 1984 Powell gave plaintiff a letter of reprimand for failing to investigate the incident.

On April 19, 1984 plaintiff was notified of his demotion during a meeting with Steve Long, Vincent Banks, and John Powell. Plaintiff was shaken by the news, and requested the rest of the day off. Steve Long granted plaintiff's request. As plaintiff attempted to exit Powell followed him and ordered plaintiff to open his locker so Powell could obtain the shift commander's manual. Plaintiff refused, and the two exchanged heated words. Plaintiff indicated he would "step outside" with Powell, and Powell warned plaintiff that his words could be perceived as a threat. After several tense minutes, plaintiff left.

Powell sought disciplinary action against plaintiff for the "threats" plaintiff made against him during the April 19, 1984 confrontation. On May 9, 1984 a four-person disciplinary board, composed of at least two blacks, convened and voted to suspend

plaintiff for three days. Steve Long, however, disregarded their vote and recommended termination. Long testified that he based his decision on the severity and accumulation of plaintiff's violations. On June 7, 1984 plaintiff was terminated.

During the period from January 1984 to June 1984, plaintiff brought numerous violations of institutional rules by co-workers to the attention of his superiors. On February 4, 1984, while plaintiff was shift commander, Ratliff entered St. Mary's with his brother, a deputy marshal.<sup>8</sup> Ratliff's brother asked whether he should check his gun. Although plaintiff stated that the gun should be checked, Ratliff informed his brother that he need not check his gun while inside St. Mary's. Plaintiff reported the incident to Powell. Powell's position was that squabbles between a shift commander and his subordinates should be handled without the intervention of the chief of custody. Ratliff was not disciplined for disobeying his supervisor.

During Ratliff's visit to St. Mary's on March 3, 1984 to pick up inmates, he discovered that the inmates' work passes were locked inside Steve Long's office. To obtain the work passes Ratliff instructed an inmate to climb over the wall into Steve Long's office and unlock the door.<sup>9</sup> Plaintiff brought this incident to the attention of Powell. Ratliff was not disciplined for permitting an unescorted inmate access to Steve Long's office.<sup>10</sup>

On March 8, 1984 plaintiff reported for work and noted that there was no officer stationed at the front door. On March 13, 1984 plaintiff again arrived at work and noted the front door

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<sup>8</sup> Ed Ratliff is white.

<sup>9</sup> There is a conflict in the evidence whether the inmate climbed over the wall or squeezed through an opening in the wall.

<sup>10</sup> Inmates apparently become irritable when they are unable to obtain their work passes. Rather than discipline Ratliff for an apparent serious breach of security, John Powell lauded Ed Ratliff for "diffusing a volatile situation."

officer was absent. Plaintiff inquired about the absence of the front door officer. Don Smith, the control center officer, said that shift commander Sharon Hefelee ordered him to open and close the front door.<sup>11</sup> On March 13, 1984 and March 14, 1984 plaintiff reported these incidents. No one was disciplined for the violations.

On April 12, 1984 correctional officer Michael Doss was the acting shift commander of the third shift.<sup>12</sup> Doss was ordered to remove inmate Theodore Hammond from a detention cell and transport him to the City Jail immediately. Doss was sluggish in carrying out these orders and the inmate escaped. Doss admitted that he was negligent in the performance of his duties, and that his negligence was a cause of the escape. Doss, however, received only a letter of reprimand as discipline.

On April 4, 1984 plaintiff reported that correctional officer John Newland took a set of St. Mary's keys home with him.<sup>13</sup> After Newland was contacted by the control center officer, he returned the keys and stated that he forgot the keys were in his pocket. Newland was not disciplined for the violation.

On April 7, 1984 plaintiff reported that during the shift of Sharon Hefelee the doors to the main power room and the annex building, which are always supposed to be locked, were left open. Sharon Hefelee was not disciplined for the violation.

On April 9, 1984 plaintiff met with correctional officer Arthur Turney to discuss Turney's service rating.<sup>14</sup> Turney, who was unsatisfied with his rating score, became indignant and cursed plaintiff with highly profane language. On April 17, 1984

<sup>11</sup> Don Smith is black.

<sup>12</sup> Michael Doss is white.

<sup>13</sup> Tom Newland is white.

<sup>14</sup> Arthur Turney is white.

plaintiff filed a report recommending that Turney be disciplined for insubordination to a supervisor. After speaking with Turney, Powell concluded that Turney was merely venting justifiable frustration, and did not discipline Turney for the incident.

As was stated, *supra*, numerous personnel changes occurred at St. Mary's in 1984. In the period from December, 1983 to December, 1984 approximately twelve black employees were terminated. Only one white employee was terminated. During the course of 1984 Steve Long hired approximately the same number of blacks that were terminated. In January, 1984 thirty blacks were employed at St. Mary's. In December, 1984 twenty nine blacks were employed at St. Mary's.

In 1980 and 1981 James Davis performed a study of the honor centers in St. Louis and Kansas City. The Davis study is a comprehensive comparison of the two institutions which discussed the shortfalls and suggested means of improvement. In a section toward the end of the study Davis pointed out that too many blacks were in positions of power at St. Mary's, and that the potential for subversion of the superintendent's power, if the staff became racially polarized, was very real. No witness for the defendants admitted he was aware of the Davis study at the time of the 1984 personnel changes.

## II. CONCLUSIONS OF LAW

### A. Count I – Title VII

In Count I plaintiff alleges that St. Mary's violated Title VII by demoting and then terminating plaintiff because of his race. Under Title VII it is an unlawful employment practice for an employer to "discharge any individual or otherwise to discriminate against any individual with respect to his . . . terms, conditions or privileges of employment because of such individual's race. . . ." 42 U.S.C. 2000e-2(a)(1). There are basically two types of actions under Title VII: disparate treat-

ment and disparate impact. Disparate treatment occurs when an employer treats some people less favorably than others because of their race, color, religion, sex or national origin. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). The plaintiff in a "disparate treatment" case is required to prove that the defendant had a discriminatory intent or motive.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) the Supreme Court set forth the basic allocation of proof in a Title VII case alleging discriminatory treatment. The plaintiff must first prove a prima facie case of race discrimination by a preponderance of the evidence. *Id.* at 802, 93 S.Ct. at 1824. Plaintiff may establish a prima facie case by showing that (1) he was within the protected class, (2) he met applicable job qualifications, (3) despite these qualifications, he suffered adverse employment action, and (4) after the adverse employment action the position remained open and the employer continued to seek applications from persons with similar qualifications. *Id.* If the plaintiff succeeds, then defendant must show a legitimate, non-discriminatory reason for the adverse employment action. *Id.* Finally, if the defendant succeeds, plaintiff must prove by a preponderance of the evidence that the reasons given by the defendant for the challenged employment action were pretextual. *Id.* at 804, 93 S.Ct. at 1825. "Despite these shifting burdens, the plaintiff retains throughout the case the ultimate burden of persuading the trier of fact that the employer discriminated against him [due to his race]." *Chaffin v. Rheem Mfg. Co.*, 904 F.2d 1269, 1272-73 (8th Cir. 1990) (citing *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093-94, 67 L.Ed. 2d 207 (1981)).

Plaintiff proved a prima facie case of race discrimination. First, plaintiff, who is black, is a member of a protected class. Second, plaintiff met the applicable job qualifications of a shift commander. At the time of his termination plaintiff had served

as shift commander for approximately four years. Plaintiff maintained a satisfactory employment record until John Powell became chief of custody at St. Mary's. Until 1984 plaintiff was consistently rated as competent by his supervisors and had not been disciplined for misconduct or a dereliction of duty.

Third, plaintiff suffered adverse employment action when he was demoted from shift commander to correctional officer I in April, 1984 and terminated in June, 1984. Fourth, after plaintiff's demotion his position as shift commander remained open and was presently filled by a white male.

Because plaintiff succeeded in proving a prima facie case, defendant must set forth a legitimate, non-discriminatory reason for the adverse employment actions. Defendant has set forth essentially two reasons for the adverse employment actions: the severity and the accumulation of violations committed by plaintiff. Defendant asserts that the nature of plaintiff's violations were sufficiently severe to justify the discipline received. On March 3, 1984 plaintiff failed to adequately supervise the employees on his shift. The unsupervised employees abandoned their posts and left St. Mary's vulnerable to escape or knavery by the inmates. Violations of internal policy, such as this, which lead to breaches of security in a correctional institution are grounds for disciplining the employee responsible. Defendant also considered the numerous violations committed by plaintiff in a short period of time. The excessive accumulation of violations over a short period of time is a legitimate reason for increasing the severity of discipline with each violation committed.

Because defendant has succeeded in setting forth a legitimate, non-discriminatory reason for the adverse employment action, plaintiff must prove that the reasons given by defendant are pretextual. Pretext is a statement that does not describe the actual reasons for the decision. *Mister v. Illinois C. G. R. Co.*, 832 F.2d 1427, 1435 (7th Cir. 1987). Plaintiff has proven that the reasons proffered by defendant are pretextual. First, plaintiff was myste-

riously the only person disciplined for violations actually committed by his subordinates. Plaintiff was given a five day suspension for the violations committed on March 3, 1984: (1) the front door officer being away from his position, (2) the control center officer leaving his post, (3) a correctional officer being absent, and (4) the lights on first floor being off. Don Treglown, the front door officer who was discovered balancing his check book in the break room, was not disciplined in any way. Elvis Thomas, the control center officer who left his post to open the front door, was not disciplined in any way. Charles Kennedy, the correctional officer absent for a substantial period of time, was not disciplined in any way.

Plaintiff was demoted for failing to log the use of a St. Mary's vehicle. The control center officer, who maintains the log book, was not disciplined in any way. Correctional officer Don Moore, who formally apologized for forgetting to log the use of the vehicle, was not disciplined in any way. Jimmie Davis, who drove the vehicle, was not disciplined in any way.

John Powell testified that it was his policy to discipline only the shift commander for violations which occurred on the commander's shift. Although the Court will not comment on the prudence of such a policy, plaintiff demonstrated such a policy only applied to violations which occurred on plaintiff's shift.

On April 7, 1984 plaintiff reported that during the shift of Sharon Hefelee the doors to the main power room and the annex building were left open. Sharon Hefelee, the shift commander, was not disciplined for the violation of a subordinate on her shift. On March 13 and March 14, 1984 plaintiff reported that twice during the shift of Sharon Hefelee no front door officer was present.<sup>15</sup> The control center officer had to leave his post in order

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<sup>15</sup> The control center officer said that Sharon Hefelee told him to open and close the front door.

to open the front door for plaintiff. Again, Sharon Hefelee was not disciplined for the violations that occurred on her shift.

Defendant asserts that the discipline plaintiff received was warranted by the severity of the violations. Plaintiff was demoted to correctional officer I for failing to insure that the authorized use of a vehicle was not properly logged. Steve Long testified, rather sheepishly, that he considered this a serious violation for which harsh discipline was justified. The Court does not seek to supplant the considered judgment of persons who have substantial experience in the administration of a correctional facility. The evidence reveals, however, that much more serious violations, when committed by plaintiff's co-workers, were either disregarded or treated much more leniently. Ed Ratliff permitted an unescorted inmate access to Steve Long's locked office. While behind a locked door the inmate had access to Long's private files. Also, the inmate could have acquired a weapon to use against a correctional officer or another inmate. Although the violation constitutes a striking and obvious breach of security, Powell not only refused to discipline Ratliff but praised him for "diffusing a volatile situation."

An inmate escaped during the shift of Michael Doss. Doss admitted that he was negligent in carrying out an order, and that his negligence permitted the escape. Although the escape of an inmate is clearly much more serious than the failure to log the authorized use of a vehicle, Doss was only given a letter of reprimand for the violation.<sup>16</sup>

During the shift of Sharon Hefelee the doors to main power room were left open. An inmate who had access to the main power room could turn off the electricity and disable the security

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<sup>16</sup> The disciplinary review board recommended that the letter of reprimand be removed from Doss' file after six months. Steve Long, however, decided to retain the letter of reprimand in Doss' file permanently.

system. Although allowing inmates access to the main power room is certainly a more serious violation than the failure to log the authorized use of a vehicle, no one was disciplined for the violation.

The violation for which plaintiff was terminated involved plaintiff's making threats to Powell. Although the Court does not condone the threatening of one's supervisor, the evidence suggests that Powell manufactured the confrontation between plaintiff and himself in order to terminate plaintiff. After plaintiff was informed of his demotion, he was distressed and requested the day off. Steve Long granted the request. As plaintiff attempted to leave, Powell followed him and provoked him into behaving irrationally.<sup>17</sup>

Plaintiff has carried his burden in proving that the reasons given for his demotion and termination were pretextual. Although plaintiff committed several violations of institutional rules, plaintiff was treated much more harshly than his co-workers who committed equally severe or more severe violations.

Although plaintiff proved pretext, plaintiff still bears the ultimate burden to prove that race was the determining factor in defendant's decision. Plaintiff need not prove racial motivation by direct evidence; instead, plaintiff may offer circumstantial evidence sufficient to create an inference of racial motivation. *Jaurequi v. Glendale*, 852 F2d 1128, 1134 (9th Cir. 1988). It is clear that John Powell had placed plaintiff on the express track to termination. It is also clear that Powell received the aid of Ed Ratliff and Steve Long in this endeavor. The question remains, however, whether plaintiff's race played a role in their campaign.

<sup>17</sup> Less than two weeks earlier, plaintiff reported that correctional officer Arthur Turney cursed plaintiff with highly profane language when plaintiff gave him an unfavorable service rating. Powell concluded that Turney was merely venting justifiable frustration and refused to discipline him. Powell, however, was considerably more sensitive as the victim of insubordination.

Plaintiff demonstrated that he was being disciplined more harshly than his co-workers. It is not clear, however, that plaintiff's race was the motivation for the harsh discipline. Plaintiff was suspended for violations of institutional rules committed on March 3, 1984. Plaintiff's black subordinates who actually committed the violations Elvis Thomas and Charles Kennedy, were not disciplined in any way. Plaintiff was demoted for failing to log the authorized use of a vehicle. Again, plaintiff's black subordinates who committed the violations: Don Moore and Jimmie Davis, were not disciplined in any way. Except for the letter of reprimand issued to correctional officer Michael Doss for permitting an escape, it appears that plaintiff was the only employee disciplined during the period for which evidence was presented. In essence, although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated.

Plaintiff brought before the Court evidence of disproportionate firing of blacks at St. Mary's in 1984. In the period between January, 1984 and December, 1984, approximately twelve blacks were terminated. In the same period, only one white was terminated. During 1984, however, Steve Long hired thirteen blacks. In January, 1984 there were thirty blacks employed at St. Mary's. In December, 1984 there were twenty nine blacks employed at St. Mary's. Therefore, these personnel changes do not create an inference of racial discrimination because the number of black employees at St. Mary's remained constant during the period in question.

Before Steve Long became superintendent at St. Mary's, only the superintendent was white. The assistant superintendent, chief of custody, and three shift commanders were black. Shortly after Steve Long became superintendent, the assistant superintendent and plaintiff were the only blacks in a supervisory position on the custody side. These personnel changes, however, do not create an inference of racial discrimination for two

reasons. First, the full-scale removal of employees from supervisory positions is often required when an institution is being poorly run. Before Steve Long became superintendent, George Lombardi was profoundly dissatisfied with the manner in which St. Mary's was managed. After allowing a period for corrective action, Lombardi commenced a purge of the institution. The fact that most of the supervisory staff was terminated or transferred is not alarming given the widespread problems that St. Mary's experienced under their control.

Second, prior to the 1984 personnel change there was one white and five blacks in supervisory positions. After Steve Long became superintendent, there were four whites and two blacks in supervisory positions. If the position of chief of custody was accepted by the black male to whom it was initially offered, there would have been three blacks and three whites in supervisory positions. It is not unusual that several black supervisors were replaced by whites because blacks held nearly all the supervisory positions before January, 1984.

There were black members of the disciplinary review boards who reviewed plaintiff's violations. Although the Court considers demotion a harsh remedy for failing to insure the logging of a vehicle, the disciplinary review board which recommended this discipline was composed of two blacks and two whites.

Finally, plaintiff introduced a 1981 study by James Davis of the Kansas City and St. Louis (St. Mary's) honor centers. In one section at the end of the study Davis compared the control of power at the two institutions by race, and warned that blacks possessed too much power at St. Mary's. Although heeding the warning of the Davis study would violate Title VII, neither Steve Long nor John Powell were aware of the existence of the study until after the 1984 personnel changes. Steve Long testified that he saw the study for the first time when it was presented to him at his deposition by opposing counsel.

In sum, plaintiff has succeeded in proving that the violations for which he was disciplined were pretextual reasons for his demotion and discharge. Plaintiff has not, however, proven by direct evidence or inference that his unfair treatment was motivated by his race. For the foregoing reasons, the Court enters judgment in favor of defendant St. Mary's and against plaintiff on the merits of Count I of plaintiff's complaint.

### B. Count III – 42 U.S.C. § 1983

In Count III plaintiff alleges that defendant Steve Long violated 42 U.S.C. § 1983 by demoting and terminating plaintiff. Title 42 U.S.C. § 1983 is a vehicle for seeking a federal remedy for violations of federally protected rights. *Foster v. Wyrick*, 823 F.2d 218, 221 (8th Cir. 1987). In order to state a cause of action under § 1983 plaintiff must allege that some person, acting under color of state law, has deprived him a federally protected right. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed. 2d 572 (1980).

Steve Long recommended the demotion and termination of plaintiff in his capacity as superintendent of a state correctional facility. Therefore, Long acted under color of state law. Plaintiff alleges that Long violated the equal protection clause of the Fourteenth Amendment. "The central purpose of the equal protection clause of the fourteenth amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976). Protection from racial discrimination in employment is provided for by the equal protection clause as well as Title VII.<sup>18</sup> *Foster, supra*, 823 F.2d at 218. Therefore, plaintiff has alleged the violation of a federally protected right.

<sup>18</sup> A person may sue under the equal protection clause for a claim of disparate treatment based on race. Disparate impact claims, however, are not cognizable under the fourteenth amendment. *New York Transit Authority v. Beazer*, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed. 2d 587 (1979).

When § 1983 is used as a parallel remedy with Title VII in a racial discrimination suit, the elements of the cause of action are the same under both statutes. *Irby v. Sullivan*, 737 F.2d 1418, 1431 (5th Cir. 1984). In accordance with the analysis set forth, *supra*, the Court enters judgment in favor of defendant Steve Long and against plaintiff on the merits of Count III of plaintiff's complaint.

Dated this 31st day of January, 1991.

/s/ Stephen Limbaugh  
UNITED STATES  
DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

No. 91-1571EMSL

Melvin Hicks,  
Appellant,

vs.

St. Mary's Honor Center, etc., et al.,  
Appellees.

Order Denying Petition for Rehearing and  
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge Fagg, Judge Wollman, Judge Loken, and Judge Morris S. Arnold would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

September 3, 1991

Order Entered at the Direction of the Court:  
/s/ Michael E. Gans  
Clerk, U.S. Court of Appeals, Eighth Circuit